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Re: ***State of Delaware v. James E. Noonan***
Case No.: 0511002158

Date Submitted: November 27, 2006
Date Decided: January 31, 2007

LETTER OPINION

Dear Counsel:

A hearing on defendant's Motion to Suppress was held before this Court on November 27, 2006 on an alleged violation of 21 *Del. C.* §4177(a) that occurred on October 31, 2005 in New Castle County. The Information filed by the Attorney General with the Criminal Clerk charged that the defendant "did drive a vehicle upon n/b DuPont Highway, New Castle, Delaware while under the influence of alcohol or any drug or a combination of alcohol or drugs or with a prohibited alcohol content as set forth in Section 4177 of Title 21." The defendant was also charged in Counts II and III of the Informations with a turn signal violation in violation of 21 *Del. C.* §4155(a), and driving with no insurance card, 21 *Del. C.* §2118(p) on the same date and location.

Following the receipt of evidence and testimony the Court reserved decision for several reasons. First, the Court ordered post-trial briefing on the issue also whether a *DeBerry*

Instruction[1] should be entered in the suppression record by the trial judge because the police officer in question, Corporal Patrick C. Wenk either destroyed or discarded his field notes from his notepad after filling out his A.I.I.R. Report ("Alcohol Initial Influence Report") completely[2]. Second, the Court in this written decision shall also decide defendant's allegation that the destruction of the field notes after filling out the A.I.I.R. Report violated *Brady*, or C.C.P. Crim. R. 16. Third, the Court reserved decision as to whether there was probable cause to arrest the defendant for a violation of 21 *Del. C.* §4177(a) on the date charged on the Information.[3]

I. The *DeBerry* Instruction, *Brady* and C.C.P. Crim. R. 16 Allegations

Defendant, James E. Noonan ("Noonan") argued in his post trial briefing filed with this Court that he is entitled to an inference that the officer's destroyed field notes were exculpatory because the arresting officer, Corporal Patrick C. Wenk ("Corporal Wenk") destroyed or discarded his field notes after completing his A.I.I.R. Report as outlined above. *DeBerry v. State*, 457 A.2d 744 (Del. 1983). Defendant argued that the State's duty to preserve evidence extends not only to the Attorney General's Office, but to all investigative agencies such as the Delaware State Police, Corporal Wenk's employer. Besides a request for a *DeBerry* instruction, defendant argued these facts outlined above require the Court to conclude that the material the State failed to preserve, Corporal Wenk's field notes, were potential *Brady*[4] material and as such, discoverable under C.C.P. Crim. R. 16, pursuant to the discovery request by defendant's counsel. Hence, defendant argues the State violated C.C.P. Crim. R. 16 because he filed a discovery request, and the State failed to provide him with the field notes of Corporal Wenk.

[1] See, *DeBerry v. State*, 457 A.2d 744 (Del. 1983).
[2] At trial he testified the field notes and the A.I.I.R. Report were "substantially similar" but were immediately transferred presumably at the Troop, to the A.I.I.R. Report. He subsequently discarded and/or destroyed the field notes.
[3] Defendant's basis for his Motion to Suppress is incorporated herein by reference.
[4] *See, Brady v. Maryland*, 373 U.S. 83 (1963).

The State argued in their post trial flings that pursuant to C.C.P. Crim. R. 16 that the State is only obligated to disclose "that portion of any written record containing the substance of any relevant oral statements made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a State Agent." (State's Op. Brief at 3). The State also argued that CCP Crim. R. 16 excludes the field notes of Corporal Wenk and as such were not disclosable under Criminal Rule 16 or *Brady*. *Id*. In addition, the State argued in their filings that the government did not have a duty to preserve the field notes of Corporal Wenk. Finally, the State argued since there is no obligation to preserve the field notes of Corporal Wenk, no duty was therefore breached under *DeBerry*; nor should any consequences flow from the alleged breach of the State's duty to preserve Corporal Wenk's field notes requiring such as an inference of exculpatory evidence, exclusion of the evidence, or even dismissal. (State's Ans. Brf at p. 2-3).

II. The Three (3) Step *DeBerry* Analysis

The State and defendant have outlined in their filings *DeBerry* and the Supreme Court three-step analysis in order to determine whether an inference of exculpatory evidence should be directed or ordered by the trial judge in the suppression record to the defendant's benefit when (1) the requested material in the possession of the State at the time of the defense's request would have been subject to disclosure under Criminal Rule 16 or *Brady*; (2) if so, did the government have a duty to preserve the evidence; and (3) if so, was the duty breached and what consequences should flow from the breach. *DeBerry at 750.*[5]

On February 21, 2006 the State responded to the discovery request and represented, *inter alia*, that "[a]ll known written and recorded statements were enclosed within the A.I.I.R. and that

[5] There is no question in the record that defendant served upon the State a letter request for discovery in the matter. (Def. Op. Brf, Dec. 15, 2006 - Exhibit A).

all written reports were enclosed and there was no potential exculpatory, lost or destroyed evidence existed." *Id.* The State argued in its post trial filings, therefore, that all *Brady* responses were already contained within the A.I.I.R. and all prior statements of the State's witnesses were already enclosed within the A.I.I.R." Hence, the State asserted it fully complied with the discovery request and any duty imposed by *DeBerry*. (Def. Op. Brf., Dec. 15, 2006 – Exhibit B).

Without citing the exact words of the record in the Motion to Suppress, the State and defense both generally agree that at the Motion to Suppress hearing, the arresting officer, Corporal Wenk testified that either shortly after arresting the defendant for a violation of 21 *Del. C.* §4177(a) that he destroyed or discarded his field notes on his notepad after filling out the A.I.I.R. Report completely.[6]

Assuming, *arguendo,* for the moment that the field notes of Corporal Wenk were within the Rule 16 Discovery Request by the defendant, and therefore were in the possession of the State at the time of defendant's request, the Court shall address the dispositive issue of the second prong of *DeBerry*; namely as to whether the State of Delaware, and Corporal Wenk had a duty to preserve the field notes in question. *DeBerry v. State*, 457 A.2d 744, 750 (Del. 1983). If there was no duty to preserve the field notes, the *DeBerry* instruction is moot.

(a) <u>The State's Duty to Preserve the Field Notes of Corporal Wenk</u>

At the Motion to Suppress hearing there does not appear any sworn testimony, evidence or documents presented that a sworn State Police Officer is directed to follow any particular format or official record keeping device for a traffic stop involving a DUI in the actual drawing up of field notes. The Court understands from the record that no written policy exists within the Delaware State Police, or Department of Public Safety, nor was a oral or written policy presented

[6] Both the State and defense apparently do not dispute factually in their filings that the field notes and A.I.I.R. Report were substantially similar.

at the hearing on the Motion to Suppress that a particular format exists as to how to compile field notes for a DUI stop by an investigating officer. No testimony in the record indicates as to what, if any, mandatory data or information such as, the performance on NHTSA field coordination tests, the alphabet test, or counting test (non NHTSA approved test). No testimony indicated what, if any, pedigree information of the defendant is required to be kept including, but not limited to, the defendant's name, address or employment in the field notes. Neither the State nor defense have asserted that a State Rule or Regulation of the Delaware State Police, or Department of Public Safety exists which mandates or requires the actual record keeping of State police officer's field notes following a DUI stop. In the instant case, a small notebook or notepad was used to collect some information and then subsequently was discarded after the A.I.I.R. Report was completed. The Court understands other techniques are used.[7] In short, it appears completely to the discretion of the police officer to even keep or maintain field notes, or what, if any form the police officer chooses to keep, or what instrument, such as a notebook, notepad, a hand, or other form of record keeping device to use while transcribing or taking the field notes before transferring the field notes to an A.I.I.R. Report.[8]

Based upon the instant suppression record the Court, as a matter of law, cannot conclude that there was a duty to preserve the subject evidence, namely field notes of Corporal Wenk after he transferred the data to his A.I.I.R. Report.

This finding Court appears to comply with prior rulings of the Superior Court of the State of Delaware. *Owens v. State of Delaware*, 2001 Del. Super., LEXIS 247 Del. Pesco, J. (January

[7] The Court did a colloquy with defendant's counsel with such other record keeping devices, including one police officer actually keeping notes by writing on their hand.

[8] The Court also understands from the Motion to Suppress record that some of the data in the A.I.I.R. Report is filled in by the Investigative Police Officer from memory, present recollection, and some raw data at the scene is inserted into the field notes. In short, the Court understands from this hearing that a Police Officer's present recollection from an almost contemporaneous or recent traffic stop for DUI plays a substantial role in the execution of the A.I.I.R. Report.

23, 2001). Similar facts existed in *Owens* where the A.I.I.R. Report was prepared, in part, from contemporaneous field notes taken by the Police Officer at the time of Owens arrest. The Superior Court noted that "[t]he A.I.I.R. Report contained detailed information regarding the Officer's personal contact with the defendant at the time of the traffic stop and included statements by the defendant, his verbal and physical responses to various field sobriety tests, as well as his appearance." *Op. at 2.* As in the instant case, the State did not provide the actual field notes in the Rule 16 discovery response by the defendant.

In *Owens*, while the Court noted the State did not provide any of this documentation prior to trial, the State attempted to move the notes into evidence after the defendant testified. The Court concluded that since the defendant in *Owens* had already received documentation contained the A.I.I.R. Report, prior to trial regarding the substance of the conversation with the arresting officer. Hence, the Superior Court indicated there was no discovery violation. The Court held that the A.I.I.R. Report contained the defendant's responses to the officer's questions regarding his physical condition and his responses in requests to perform various field sobriety tests by the arresting officer. The Court noted the State did not withhold documentation of the substance of defendant's statements to the officers because these statements were already contained in the A.I.I.R. (Op. at 6).[9]

As in this case, without an accurate record as to what is contained in the field notes, as well as the fact that the field notes of Corporal Wenk were contemporaneously or almost

[9] The Court in *Owens* went on to conclude that the "field notes at issue are merely notations the officer made at the time of the arrest in order to accurately document the content of his contact with Owens [the defendant] for later transfer to the A.I.I.R. Report." (Op. at 6). The Court in Owens then went on to conclude that the police officer could not interpret his field notes and testified at trial that he transferred the information from his notes into the A.I.I.R. the same night while the incident was still fresh in his mind. (Op. at 6). The Court therefore concluded that, "the delayed disclosure of the field notes is of no consequence because there contents are contained within the A.I.I.R. Further, the trial court allowed the defense counsel to review the notes and use them on cross-examination." (Op. at 6). Finally, the Court concluded the State's failure to provide the officer's field notes did not violate [Superior Court Criminal] Rule 16.

immediately transferred into the A.I.I.R. Report, and the defendant is already in possession of the statements in his Rule 16 Discovery Request. No such duty can be found on behalf of the State to keep or maintain the field notes by Corporal Wenk. No violation of C.C.P. Crim. R. 16 can also be found by this Court, nor does any *Brady* violation exists because this Court finds no duty exists to keep or maintain the field notes. Hence, there is no duty to provide the defendant a copy of the same following his C.C. P. Crim. R. discovery request. Therefore, the Court finds the defendant is not entitled to a *DeBerry Instruction* as requested in the instant Motion to Suppress hearing.

III. The Issue of Probable Cause

(i) The Facts.

At the Motion to Suppress Hearing held on November 27, 2006, Corporal Wenk from Troop 2 testified that he was on Uniform Patrol on October 31, 2005 in the New Castle area for the purpose of "observing and looking for motor vehicle infractions". Corporal Wenk testified he had prior DUI training with the State Police in July 2000 and has been NHTSA certified as an instructor, as well as an operator of the Intoxilizer 5000. In April 2006 he received his Certified Instructor certificate in DUI Enforcement and completed his State Police NHTSA training in October 2000. He has completed a DUI refresher course in 2003.[10,11]

Corporal Wenk, on October 31, 2005 at 2:17 a.m. was driving a blue marked vehicle in DuPont North lane in New Castle County and observed a brown 2005 Ford Mustang driven by the defendant traveling northbound in the left hand lane on N. DuPont Highway. The defendant entered the left turning lane intersection at Boulden Boulevard as if to turn left with no turn

[10] State's Exhibit A for identification was moved into evidence without objection.
[11] State's Exhibit B, his training certificate was also moved for identification into evidence without objection.

signal. The defendant came to a red light at Route 32 at Boulden Boulevard. When the light turned green the defendant made a u-turn without using a turn signal.

The defendant then turned on his right turn signal and went into the Golden Dove restaurant parking lot.

According to Corporal Wenk, he made a complete controlled stop of defendant and subsequently approached the defendant's motor vehicle. The defendant was seated behind the wheel of his motor vehicle. The weather conditions were "clear and dry". Corporal Wenk was physically located on the driver's side of the defendant's motor vehicle and inquired, "Do you know why I stopped you?" The defendant answered in the negative, "No.". Corporal Wenk informed the defendant that he had used no turn signal.[12] The defendant then operated both turn signals and looked at his automobile panel as to check the operation of the turn signal. The defendant subsequently made an admission he was coming from Gator's Bar in the area and had a "few alcoholic beverages at Gator's".

The defendant then advised Corporal Wenk; "I'm not supposed to be driving but the passenger in his motor vehicle was too drunk to drive." Corporal Wenk testified the defendant was wearing blue jeans and a yellow t-shirt and had "bloodshot, glassy eyes".

The defendant also spoke "slowly" in response to Corporal Wenk's questions as he was concentrating deep on his speech, but was "not confused".

The defendant produced his license and registration in a timely manner and was asked to exit the motor vehicle. The defendant was also "cooperative" according to the notation in the A.I.I.R. Report and Corporal Wenk's testimony.

[12] The defendant does not argue or assert in his Motion to Suppress that no reasonable articulable suspicion exist to stop the defendant (cite case law)

The defendant was then requested by Corporal Wenk to walk to the rear of his motor vehicle between the police car and the parking lot to perform field sobriety coordination tests. The defendant voluntarily performed these field tests at 2:17 a.m. on the date charged in the Information. The defendant advised Corporal Wenk that he had not taken any medication or previously suffered any physical infirmity or injury before performing the field tests.

On the alphabet test, the defendant performed the test correctly; he cited D-B "without difficulty". On the counting test, the defendant was instructed, after demonstration to count from 101 to 89, the defendant omitted number 95.[13,14] On the Horizontal Gaze Nastagnus ("HGN") test a proper foundation was laid under *Zimmerman v. State,* 693 A.2d 311 (Del. Supr., April 10, 1991) by the State and the Suppression hearing. The defendant performed the HGN test. Corporal Wenk testified after detailing the defendant's performance on the test that he observed six out of possible six clues during the HGN test. Corporal Wenk also represented based upon these six (6) clues that he observed that there was a seventy-seven percent chance that the defendant had a BAC reading of .08.

On the Walk and Turn test the defendant was given instructions by Corporal Wenk and an imaginary line was established in the parking lot. The defendant represented to Corporal Wenk that he understood his instructions for the walk and turn test. The defendant then performed the Walk and Turn field test. Following his detail in the record as to defendant's performance, Corporal Wenk testified there were two clues present, including that the defendant was unable to keep his balance during the instructional phase and the defendant "broke his stance" on the first nine steps and he missed heel-to-toe on steps number 1 and 2. Corporal

[13] State's Exhibit A for identification was moved into evidence without objection.
[14] The alphabet is not a NHTSA approved test and the officer testified that because the defendant missed number 95 he failed the test.

Wenk concluded and presented testimony at trial that he believed there was a sixty-eight (68%) percent chance the defendant had a BAC greater than .08 because of the two (2) clues.

Next, the defendant was requested by Corporal Wenk and he performed the One-Legged Stand test. The defendant represented to Corporal Wenk that he understood how to perform the One-Legged test. Corporal Wenk testified he observed three of four clues. Corporal Wenk presented detailed testimony of the performance in the One-Legged Stand test at the Motion to Suppress hearing. Corporal Wenk therefore concluded there was a sixty-five (65%) percent chance that the BAC was greater than .08. According to Corporal Wenk, the defendant raised his left leg while performing the test; he raised his right arm when he was counting number 5; he put his foot down on number 5 and he picked his foot up and raised his right arm greater than six inches in violation of Corporal Wenk's interpretation of the NHTSA standards. Corporal Wenk testified to the Court that these observations of the defendant during the Walk and Turn test, he therefore believed constitute a failure of the test.

The defendant was also given a portable breath test by Corporal Wenk. The defendant failed. The defendant was then arrested at 0231 hours and taken to the Troop for administration of an Intoxilizer 5000.

III. THE LAW

"On a Motion to Suppress, the State bears the burden of establishing that the challenged search or seizure comported with the right guaranteed (the defendant) by the United States Constitution, the Delaware Constitution, or Delaware statutory law. The burden of proof on a Motion to Suppress is by a preponderance of evidence for the State." *Hunter v. State*, 783 A.2d 558, Del. Supr., 279 2000 Steele, J. (August 22, 2001); *State v. Bien-Aim*, 1993 Del. Supr., LEXIS 132 Del. Supr., Toliver, J. (March 17, 1993) (Mem. Op.).

As set forth in *Spinks v. State*, Del. Supr., 571 A.2d 788 (1990) probable cause is defined as follows:

> Under Delaware law, a police officer is authorized to make a warrantless arrest and search when he has probable cause to believe that a crime or a violation of the Motor Vehicle Code has been committed. 21 Del.C. § 701; Garner v. State, Del. Supr., 314 A.2d 908, 910 (1973). Probable cause is an elusive concept which is not subject to precise definition. It lies "somewhere between suspicion and sufficient evidence to convict" and "exists when the facts and circumstances within . . . [the officers'] knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." State v. Cochran, Del. Supr., 372 A.2d 193, 195 (1977).

Under *State v. Maxwell,* Del. Supr., 624, 926, 929-30 (1993), probable cause is defined further:

> [A] police officer has probable cause to believe a defendant has violated 21 Del. C. § 4177. . . 'when the officer possesses' information which would warrant a reasonable man in believing that [such] a crime has been committed. *Clendaniel v. Voshell,* Del. Supr., 562 A.2d 1167, 1170 (1989). . . . A finding of probable cause does not require the police officer to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not. (citation omitted) . . . the possibility there may be a hypothetically innocent explanation of each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest. (citation omitted) . . . 'probable cause exists where the facts and circumstances within [the officer's] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed.' (citation omitted).

IV. OPINION AND ORDER

In the instant case, sufficient facts and circumstances exist in the record for this Court to conclude independently of the police officer's testimony that probable cause existed to arrest the

defendant in violation of 21 *Del. C.* §4177(a).[15] The record consists of a motor vehicle violation by the defendant; a turn signal violation; and an admission of drinking alcoholic beverages at Gator's bar; "bloodshot, glassy eyes;" failure of the HGN test with all six (6) clues; a failure of the NHTSA approved Walk and Turn test; Failure of the NHTSA One-Legged Stand test; and Failure of the portable breath test as administered by Corporal Wenk. In short, as the Superior Court ruled in *State v. Maxwell*, 624 A.2d at 930 (citing *Jarvis v. State*, 600 A.2d 38, 43 (Del.Super.Ct. 1991)) "[t]he police are only required to present facts which suggest, when those facts are viewed with the totality of the circumstances, that there is a fair probability that the defendant has committed a crime."

The Court also finds there is sufficient probable cause to support Count I in the Information for a turn signal violation in violation of 21 *Del. C.* §4155(a) and no insurance card, 21 *Del. C.* §2118(p).

The Court Clerk is directed to reschedule this matter for trial no later than sixty (60) calendar days with notice to counsel of record.

IT IS SO ORDERED this 31st day of January, 2007.

John K. Welch
Judge

/jb

cc: Jay Paul James, Judge, CCP
Theresa Bleakly, Scheduling Supervisor

[15] In light of the recent decision by the Superior Court, the Court discounts the right, if any, given to the alphabet and counting test results. *See, State of Delaware v. Charles Ministero, Jr.,* I.D. No.: 0306011221 WCC, Mem. Op., Carpenter, J. (December 21, 2006).